IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1941

No. 32

ALFRED E. ROTH,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE PETITIONER.

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Opinion Below.

The opinion of the Circuit Court of Appeals (R. 1117-1139) is reported on 116 F. 2d 690.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on December 13, 1940 (R. 1140). Petitioner filed a petition for rehearing which was denied January 23, 1941 (R. 1239). The petition for a writ of certiorari was filed February 27, 1941 and was granted April 7, 1941. The jurisdiction of this court is invoked under section 347 (a)

of Title 28, United States Code. (Judicial Code, Section 240 (a) as amended by the Act of February 13, 1925.) See also Rule XI of the Criminal Appeals Rules, promulgated by this court on May 7, 1934.

Questions Presented.

The petitioner contends that he has been tried before a packed jury, deprived of a fair trial by the improper and prejudicial conduct of both the judge and prosecutor, and convicted without evidence on a fatally defective indictment which was not returned in open court by a legally constituted grand jury.

On these allegations the following questions are presented.

1. Whether the limitation of female jurors to a particular civic group who attended jury classes where lectures presented the views of the prosecution, to the total and systematic exclusion of all others was a denial of the constitutional right of trial by an impartial jury.

2. Whether the action and conduct of the trial judge did not deprive the petitioner of a fair and impartial trial and of the benefit of the presumption of innocence.

3. Whether the misconduct of the prosecuting attorney permitted and condoned by the trial judge, was such a deviation from the usual trial procedure and so prejudicial to the petitioner as to have deprived him of a fair and impartial trial.

4. Whether the petitioner was properly put to trial on an indictment which had not been returned by a grand jury in open court.

5. Whether the evidence is so utterly insufficient to establish the guilt of the petitioner as to require a reversal of the judgment.

6. Whether the alleged indictment upon which petitioner was tried (a) charged a violation of any laws of the United States, and (b) whether it was sufficiently certain and definite to inform the petitioner of the charge.

7. Whether the appointment by the court of the previously retained counsel of one defendant, over his objection on the ground of adverse and conflicting interests, to act also as counsel for a co-defendant so affects an effective representation of counsel for both the defendants as to result in prejudice to all defendants.

8. Whether a federal grand jury was illegally constituted and void because the jury commissioner and clerk of the district court intentionally totally excluded the female sex from the jury box from which the grand jurors were drawn, the state law making it mandatory that females be placed on jury lists.

Constitutional and Statutory Provisions Involved.

The constitutional and statutory provisions involved are:

The Fifth Amendment to the United States Constitution.

The Sixth Amendment to the United States Constitution.

U.S.C. Title 18, sec. 88 (Criminal Code, sec. 37).

U.S.C. Title 18, sec. 91 (Criminal Code, sec. 39).

U.S.C. Title 28, sec. 411 (Judicial Code, sec. 275).

U.S.C. Title 28, sec. 412 (Judicial Code, sec. 276).

Illinois Rev. Stats. (1939) C. 78, Sec. 1.

Illinois Rev. Stats. (1939) C. 78, Sec. 25.

They appear in the appendix, pp. 73-76.

Statement of the Case.

The petitioner is engaged in the private practice of law, specializing in federal practice (R. 833). Many lawyers referred federal matters to the petitioner (R. 749, 796, 889, 890, 783). Kretske, a co-defendant and petitioner in No. 31, while engaged in the private practice of law, referred several federal matters to the petitioner for trial (R. 805). Glasser, a co-defendant and petitioner in No. 30, was an assistant United States Attorney for the Northern District of Illinois from March, 1935 to June 1939 (R. 186-187). He was in charge of prosecution of all liquor violation cases at Chicago (R. 188) and as such was the adversary of the petitioner in several cases.

There arose a sharp diversity as to policy between the office of the District Attorney and the local Alcohol Tax Unit, who would bring in petty offenders and not the big fellow (R. 719, 891), which culminated in contempt proceedings against Yellowley,[1] District Supervisor for the Alcohol Tax Unit (R. 1031), who, after his appearance before the April, 1937 Grand Jury, solicited the foreman thereof to come to his hotel room (R. 946).[2]

It is not denied that, subsequently, Yellowley threatened Glasser, the Assistant District Attorney, with the statement (R. 948):

> "Mr. Glasser, I will get you if it is the last thing I ever do."

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[1] Offer of proof of this petition and answer was denied (R. 1031-1034).

[2] This jury made a report emphatic in its criticism of the policy and conduct of the Alcohol Tax Unit above referred to (R. 789-795). Offer of proof of this report was denied (R. 795).

Upon the elevation of District Attorney Igoe to the federal bench a new district attorney was appointed and Glasser, among a number of other assistants, resigned.

On September 29, 1939, an indictment was filed against the petitioner and four others containing two counts, the first of which was dismissed (R. 38, 715).

At the time of the discharge of the September 1939 Grand Jury on September 29, 1939, there was no record of the return of any indictment against this petitioner. Motion to quash on this ground was denied (R. 42).

In selecting the September, 1939 Grand Jury, the jury commissioner and the clerk of the district court deliberately totally excluded the female sex, although the Illinois State Law made it mandatory that females be placed on jury lists. Motion to quash on this ground was also denied (R. 42).

The second count of the indictment, in substance, charged the petitioner and others with conspiracy to defraud the United States of the conscientious services of an Assistant United States Attorney in the Northern District of Illinois by promising, offering, causing and procuring to be promised and offered, money and other things of value to an officer of the United States with intent to influence his decision and action on certain cases which were at times brought before him in his official capacity (R. 22-28). A demurrer was interposed on the grounds that the indictment failed to charge any violation of law and that it was not sufficiently certain and definite to inform the petitioner of the charge (R. 42). The trial judge, in overruling the demurrer (R. 160) stated: "• • • the indictment is somewhat vague and indefinite" and that the defendants were entitled to a bill of particulars— "• • • that they know definitely and in particular just exactly what they are charged with" (R. 160).

The underlying theory of the Government's case is very vague (R. 154-155, 160). As stated by the District Attorney it was that "There was a conspiracy on foot to solicit persons to make promises" (R. 154). Although the Government was ordered to file a bill of particulars naming the persons who made solicitations and what persons were solicited and on what dates, and at what places and what amounts, it is significant that the name of this petitioner is not even mentioned in the entire 12 pages of the bill of particulars (R. 77-89) nor is there any inference therein of any wrongful act on the part of this petitioner.

The record clearly shows that the petitioner did not represent any client in any criminal case until after the institution of a prosecution and the defendants apprehended, and, in the libels (civil cases) after forfeiture proceedings were begun. Neither any client nor any other person testified that the petitioner directly or indirectly solicited any person or made any promises to any person other than that he would handle the cases of his clients on the merits to the best of his ability.

The proof by the Government merely showed that the petitioner acted as trial counsel in a few cases four of which were referred to him by Attorney Kretske (R. 874, 230, 861, 868).

One of the four cases Kretske referred to the petitioner was a libel case involving a Chrysler sedan (R. 874). The case was tried before District Judge Barnes on the Alcohol Tax Unit Agent's report, Glasser opposing, and the automobile was ordered returned to the claimant. Judge Barnes testified that the agent's statement was not sufficient to forfeit the car and stated: "* * * I had no more right to take it than I had to take yours" (R. 718).

Another one of the four cases referred to the petitioner by Attorney Kretske involved a still at 6949 Stony Island

Avenue, Chicago. The case was prepared for hearing by the petitioner with the aid of the defendants and all appeared before Commissioner Walker, ready to proceed. Glasser, opposing, moved for three weeks continuance. United States Commissioner Walker testified "He (the petitioner) was vigorous and was certainly very earnest in opposing a continuance" (R. 295), which was granted.

An indictment was obtained in that case before the adjourned hearing date to which indictment all defendants when called for arraignment, entered pleas of not guilty and the case was set for trial on May 5, 1938 (R. 836). On May 2, the defendants prepared for trial in the office of the petitioner, at which time statements of their proposed testimony were dictated to the petitioner's stenographer, Frances Bornhorst (R. 830) and written in her short-hand notebook (Exhibit 185, R. 831) and transcribed (Exhibits 182, 183 and 184, R. 831). Petitioner, with the aid of the defendants, also prepared a sketch (Exhibit 38, R. 836, 837), of the vicinity of 69th and Stony Island Avenue, to assist him in trying the case. Two of the defendants in that case, when called by the Government as witnesses in the instant case, testified that they were innocent of the charges involved in their own case,—that they got a lawyer to bring out the facts in their own case, and were prepared to take the stand before Judge Woodward (before whom their own case was set for trial) and to so testify therein (R. 272, 347). The third defendant therein also claimed he had nothing to do with the still and was going to so testify before Judge Woodward (R. 235) but on the trial of the instant case he testified that he had admitted his guilt to agent Bailey about September 1939 (R. 236).

When the petitioner and his clients appeared on the trial date, May 2, 1938, ready for trial in that "still" case, they learned that the case had been stricken a week prior thereto, with leave to reinstate, without notice to either clients or their counsel (R. 235-236).

The uncontradicted testimony is that the case was stricken with leave to reinstate by Glasser at the direction of the investigator in charge of the alcohol tax unit, who advised Glasser they did not have sufficient evidence to convict (R. 918-920).

Corroboration of Glasser's testimony that the case was stricken with leave to reinstate, at the request of the agent in charge, because of the weakness of the evidence, is furnished by the fact that the record discloses the case as never having been reinstated (Exhibit 226, R. 1034).

The third case referred to the petitioner by Attorney Kretske was one involving Edward Dewes who was one of several defendants jointly indicted (R. 547, 568). Petitioner prepared the case for trial, together with Dewes his co-defendants and their lawyers (R. 764). Numerous continuances were had in this case due to the illness of Daniel Anderson who was representing one of the co-defendants, Victor Raubunas, therein (R. 823). That case was tried after Glasser resigned.

In the fourth case referred by Attorney Kretske, the petitioner represented one Harry Dukatt in a hearing before the United States Commissioner, where he was discharged (R. 701). Subsequently Dukatt was indicted in two cases and entered a plea of guilty to both indictments, being represented by the petitioner, and was sentenced to the penitentiary for a period of two years (R. 700-701).

The petitioner was engaged by Frank Hodorowicz to represent him and three co-defendants in connection with an alcohol tax violation. While attorney for the defendants, the petitioner conferred with Glasser as to his attitude on a plea of guilty and was advised that it was that of a substantial penitentiary sentence (R. 858). The petitioner informed his clients of Glasser's attitude (R. 859). On the trial on their plea of not guilty, Frank Hodorowicz and

his co-defendants were represented by another lawyer (R. 859). All the defendants were convicted, Glasser prosecuting (R. 312).

The petitioner represented one Paul Svec in the defense of two criminal cases, Glasser prosecuting. On the trial of the first case Svec was convicted and sentenced to a two year term of imprisonment and fined $500.00 on October 4, 1938 (R. 557). While he was at large on an appeal bond, on December 9, 1938, agents under Yellowley arrested him in connection with an illicit still on Wells Street in Chicago. He was then taken to their office, there furnished with Glasser's unlisted telephone number and told to call Glasser and have him guarantee to the agent payment of money to them (R. 584-585, 932-933). This attempt at entrapment failed and was fully disclosed by the prompt action of Glasser in secreting an agent of the Federal Bureau of Investigation in his office where the agent overheard a conversation with Svec in which the latter confessed and said (R. 565):

> "The agents told me they would let me go if I did the telephoning" (See R. 583-585, 932-935).

Svec denied any connection with the Wells Street still (R. 558) and stated that he had never before tried to fix his cases (R. 566, 584). He further stated that the petitioner would not permit him to sign any statement for Glasser (R. 564). After a full hearing on the second case, Svec was discharged (R. 568). Thereafter his conviction on the first case was affirmed by the Seventh Circuit Court of Appeals and he was committed to the penitentiary to serve his sentence (R. 556, 557).

United States v. *About 151.682 acres of land, etc.* was gone into by the Government on cross-examination of the petitioner. The case involved a libel of a farm and personal property and was referred to the petitioner by

Attorney Sydney Baker (R. 749) to prosecute an appeal after the Government had been victorious in the District Court, Glasser representing the Government. The judgment of the lower court was reversed 99 F. 2d 716. The petitioner represented one of the claimants in the case who was indicted while the civil case was pending on appeal (R. 868, 869) and was thereafter substituted by another lawyer who disposed of the criminal case (R. 880-881).

In the instant case the alleged indictment limited the alleged conspiracy to cases in the Northern District of Illinois (R. 28). Nevertheless, the Government over the objection of the petitioner (R. 98, 680) introduced evidence through one Alexander Campbell concerning a case in the Northern District of Indiana in which the petitioner was defense counsel (R. 680). In connection therewith, Campbell testified that on September 30, 1938, at Ft. Wayne, Indiana, the petitioner attempted to prevent the return of the indictment of Edward and William Wroblewski whereas the indictment had been returned four months prior thereto, on April 25, 1938 (Exhibit 186-A, 186-B, 186-C, R. 840).

William Wroblewski, one of the two brothers named as defendants therein, called as a Government witness testified that he was informed of the Indiana conspiracy indictment in April 1938 and told to arrange bail (R. 635). The other brother Edward, also a Government witness, testified that he first met and hired petitioner when he was preparing his case for trial in Indiana in September 1938 (R. 676-677).

Petitioner had knowledge of the indictment in Indiana before he talked to Campbell, as the petitioner had at Chicago examined the United States Commissioner's removal file (Exhibit 186, R. 840) and a certified copy of the Indiana indictment (Exhibit 186-A, R. 840) after he was

engaged in September 1938 and before he went to Indiana (R. 836-840).

In the instant case the petitioner testified to the conversation he had with Campbell on September 30, 1938, wherein the petitioner requested a copy of the Wroblewski indictment and asked to be advised when to appear in court (R. 842). A letter from and signed by Campbell, dated October 7, 1938 was received by the petitioner complying with his request (R. 842).[3]

Petitioner also testified that during the September 30, 1939 conversation he complained to Campbell because of the indictment of the defendants in Indiana after they had been dealt with for the same acts and conduct a year prior thereto (R. 840, 842, 846), and stated that "We don't do things like that in Chicago" (R. 842).

The obvious confusion of Campbell as to the September 30, 1938 conversation is further emphasized by his erroneous account of the conversation of July 10, 1939 wherein he stated the petitioner asked him whether or not the sentence in the Northern District of Indiana would run concurrently with the sentence in the Southern District case (R. 684). The implication being that petitioner tried to work out a concurrent sentence. As a matter of fact, the petitioner called on Campbell on July 10, 1939 to see that the commitment as to Edward Wroblewski issued promptly to insure the serving of the two sentences concurrently

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[3] The body of the letter is as follows:

"*In re*: *U. S.* v. *Edward Wroblewski, et al.*, Hammond Criminal 1015.

"Dear Sir:

"Inclosed please find copy of indictment in above captioned matter.

"This being a Hammond Division case, it will be up for trial during the Hammond sitting of the Federal Court which will begin on November 9.

"If there is any other information you desire it will be agreeably furnished" (Exhibit 137, Orig. R. 842).

(R. 848) which was so ordered by Judge Baltzell more than two months prior thereto. Corroborative of the petitioner's statement that he did not ask Campbell to work out a concurrent sentence and that the petitioner advised Campbell of the entry of Judge Baltzell's order and petitioner's suggestion that he confirm it, is the letter received by the petitioner from and signed by Campbell dated July 15, 1939.[4]

The insistence of the trial judge upon a conviction is best displayed by the caustic remark, made in the presence of the jury during the cross-examination of the petitioner when the judge exclaimed, "He (meaning the petitioner) has a lot of last answers." (R. 878) thereby indicating a disbelief and conflict in the testimony of the petitioner when in fact no conflict in his testimony existed (R. 833-884).

In similar vein, the trial judge interrupted the cross-examination of the petitioner and when he could not exactly fix a certain time, remarked, "Well, why don't you say so?" (R. 877). Again during cross examination when the petitioner was asked if he had a certain conversation with Mr. Bailey, to which the petitioner replied he would not know, the trial judge remarked, "Well, just say so then" (R. 877). The three preceding remarks very closely

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[4] The body of the letter is as follows:

"Dear Sir:— *In re U. S.* v. *Edward Wroblewski*

Please be advised that Mr. Albert C. Sogemeier, Clerk of the U. S. District Court for the Southern District of Indiana, advises that on April 29, 1939 the above named defendant changed his plea to guilty and on May 5, 1939 was sentenced to eighteen months, said sentence to be served in the U. S. Northeastern Penitentiary, Lewisburg, Pennsylvania: fined $500.00 without costs, which said sentence was to run concurrent with the sentence in the Northern District of Indiana" (Exhibit 135, Orig. R. 849).

followed each other, appearing within two successive pages of testimony.

Again during the cross-examination of the petitioner, when counsel for the petitioner complained of the shouting of the prosecutor and stated that the prosecutor did not yell when he cross-examined the Judge (having reference to District Judge Woodward) the trial judge remarked, "Mr. McGreal is not cross-examining a judge" (R. 863), indicating that the petitioner was not entitled to the same consideration as other witnesses and thus detracted from the weight of his testimony.

The trial judge prejudicially limited the right of cross-examination. Government witness Swanson was under indictment in the federal courts in Illinois and Ohio. In order to develop a possible biased state of mind and to show that the witness was under the influence and in fear of government agent Bailey, Swanson was asked if Bailey could not get the indictment in Ohio called up for trial (R. 237). The reluctance of the witness to answer the question is not disclosed by the record because of the belated objection of the prosecutor (R. 237). Immediately upon the prosecutor voicing his objection, the trial judge remarked, "That is entirely out of order. Mr. Bailey is not running the courts down in Cleveland" (R. 237).

Cross-examination was again prejudicially limited when the trial judge refused to permit an inquiry as to favoritism shown to a Government witness, a convict who had been transferred from a penitentiary where he was serving his sentence, to a reformatory at Milan, Michigan. In sustaining the prosecutor's objection, the trial judge stated, "They are both Federal Penitentiaries" (R. 555).[5]

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[5] The institution at Milan, Michigan is a "Federal Correctional Institution," and not a penitentiary. See Bulletin of the registrar of the Department of Justice in the courts of the United States, 39th Edition, 1938, issued by Department of Justice, Washington, D. C.

The trial judge made statements of fact, based on his own personal knowledge, as to one Nick Abosketes, a Government witness in the instant case (R. 941, 943, 1030).

The trial judge during the cross-examination of Attorney Kretske, implied impropriety and irregularity in the reference of cases by Kretske to the petitioner, by stating that there was nothing difficult about the trial of alcohol cases (R. 816).[6]

During the cross-examination of a Government witness, also formerly represented by petitioner, in spite of the showing in the record that the indictment against the witness was still pending (R. 236-238, 317, 918-921, 837)—the case had been merely struck from the docket with leave to reinstate—the trial judge summed up and repeated some of the contentions of the Government, as if those contentions were conclusive against the petitioner, by asking the witness the question (R. 346) "You were never convicted, never paid a fine, never went to jail?" Although the question was truthfully answered in the negative, the prejudice is obvious. In examining another Government witness also formerly represented by petitioner and accused in the same pending indictment, the trial judge stated in a declarative question (R. 232) "The case just dropped out of mid air?" This question also required an answer in the negative which was equally prejudicial. In spite of the fact that the record clearly showed that the only time that case was ever called in court was before Judge Woodward for

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[6] This Court has considered many questions raised in alcohol cases sufficiently important to grant certiorari. A few of the cases are noted, viz., *United States* v. *Falcone*, 61 S. Ct. 204; *Nardone* v. *United States*, 308 U. S. 338; *Nathanson* v. *United States*, 290 U. S. 41; *Sorrells* v. *United States*, 287 U. S. 435; *Grau* v. *United States*, 287 U. S. 124; *Taylor* v. *United States*, 286 U. S. 1; *United States* v. *Lefkowitz*, 285 U. S. 452; *Husty* v. *United States*, 282 U. S. 697; *Go Bart* v. *United States*, 282 U. S. 345; *Gambino* v. *United States*, 275 U. S. 310; *Carroll* v. *United States*, 267 U. S. 132.

arraignment and plea and to set for trial (R. 235-236), in the course of the examination of another Government witness, formerly represented by petitioner and accused in the same indictment, the trial judge persisted in treating an arraignment as though it had been a trial (R. 237-348). His questioning led the jury to believe that it was incumbent to disclose facts in the case on an arraignment (R. 347-348) which of course is not permissible.

Again, after District Judge Barnes testified in the Chrysler sedan case that the case was tried on the agent's statement, as is frequently done (R. 717-718), and after the petitioner had also testified on cross-examination that the case was tried on the agent's report (R. 838), the trial court asked the petitioner the following question: "Was any witness sworn or testimony taken?" This question necessarily compelled an answer of "No," (R. 873) and deprived the petitioner of the benefit of Judge Barnes' testimony and tended to imply that because no witness was sworn or testimony taken, some irregularity existed in the manner in which the case was tried.

The rulings of the trial judge on admissibility of evidence were arbitrary and the result of bias in admitting in evidence Exhibits No. 81 and 113 (R. 529, 532) containing the summary of conversations between Government agents and third persons not parties to or witnesses in the instant case, and the proposed testimony of witnesses allegedly tending to implicate the co-defendant Kaplan in sundry violations of law, and also describing his racial descent and stating that he was reputed to be a bootlegger worth $200,000.00, and that he was arrested in connection with a killing and that he was sentenced to pay a fine for violation of the National Prohibition Act.

Gross abuse of his position by the trial judge appears throughout the record, and will be more fully discussed under point II. in the argument.

The prosecutor throughout the trial violated the right of the petitioner by misstating facts to the court (R. 219); changing cross examiners and reexamining on matters once covered (R. 882); putting words in the mouth of a witness (R. 636); misleading the jury with unfounded inferences (R. 883, 289); refusing to permit a defendant to examine exhibits in the prosecutor's possession for the purpose of refreshing defendant's recollection notwithstanding the order of court to that effect (R. 980-982); asking improper questions and conducting insidious cross-examination (R. 908, 989-991, 954). A detailed discussion of the misconduct of the prosecution appears in point III. of the argument.

The trial was a long one, consuming about twenty-six days. The record is voluminous and the exhibits equally so, consisting of grand jury records, court files, district attorney's files, agents' reports, criminal and civil pleadings and a mass of other material.

It is clear that the trial was so colored by constant errors that the petitioner was tried in an atmosphere fatal to the proper administration of justice.

All the defendants were found guilty. Petitioner filed a motion for a new trial and in arrest of judgment (R. 1046). Among other grounds in support of same, was one supported by uncontradicted affidavits to the effect that by reason of total and systematic exclusion of persons otherwise qualified he did not have a trial jury free from bias, prejudice and prior instruction (R. 1049-1051). The motions were denied and exceptions were noted (R. 103, 1060). Petitioner was sentenced to pay a fine of $500.00 (R. 104). The Circuit Court of Appeals affirmed (R. 1130-1140).

Specification of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that the trial court did not abuse its discretion in denying petitioner's motion for a new trial based on uncontradicted affidavits affirmatively showing and offering to prove the total and systematic exclusion from the jury list, from which the petit jury was picked, of females who were not members of a private league of women voters and who had not, as members of the league, attended jury classes maintained for the purpose of giving instruction, which exclusion denied the petitioner the constitutional right of trial by a fair and impartial jury.

2. In holding that the acts and conduct of the trial judge did not deprive the petitioner of the presumption of innocence and prejudice his right to a fair and impartial constitutional trial.

3. In holding that the misconduct of the prosecuting attorney, permitted and sanctioned by the trial judge, did not require reversal of the judgment.

4. In failing to hold that there was no evidence to support the judgment and that therefore a reversal of the judgment was required.

5. In holding that the record shows that the indictment was returned in open court by a grand jury.

6. In holding that the indictment properly charged an offense, and was sufficiently certain and definite to inform the petitioner of the charge.

7. In holding that the appointment of the defendant Glasser's counsel, over his objection on the ground of adverse and conflicting interests, to act also as counsel for co-defendant Kretske, did not impair the right to have

effective assistance of counsel, to the prejudice of all defendants.

8. In failing to hold that the jury commissioner and the clerk of the district court violated the laws of the State of Illinois and of the United States in deliberately excluding females in the selection of the grand jury and that consequently the grand jury was illegally constituted.

SUMMARY OF ARGUMENT.

I.

The clerk and jury commissioner illegally delegated their duties to select jurors by permitting a private organization to submit to them for placing into the jury box a list of women who were members of a private organization and had attended jury classes where lectures presented the views of the prosecution. This was a complete abdication of the function of the jury commissioner and clerk of the court in the selection of the jury list to be placed in the jury box. This resulted in the petitioner being tried by a packed jury which was limited to a particular group thereby depriving the petitioner of a trial by a fair and impartial jury.

II.

The petitioner was deprived of a fair and impartial trial by the acts and conduct of the trial judge in cross-examining petitioner in a manner and making remarks injurious to petitioner's credibility and defense; by examining witnesses in a manner and making remarks favorable to the prosecution and prejudicial to the accused; by making statements of alleged facts based on his personal knowledge; by limiting the right of cross-examination to show bias, reward by and the coercive effect of Govern-

ment officers; by admitting in evidence Government agents' reports containing the criminal history of a co-defendant and *ex parte* statements tending to involve the co-defendant in a violation of the law.

III.

The prosecuting attorneys throughout the trial by their misconduct, permitted and condoned by the trial judge violated the petitioner's right to a fair trial by misstating facts to the court; changing cross-examiners and re-examining on matters once covered; by putting words in the mouths of witnesses; by misleading the jury with unfounded inferences; by refusing to permit a defendant to examine exhibits in the prosecutor's possession for the purpose of refreshing the defendant's recollection notwithstanding the order of court to that effect; and by asking improper questions and conducting insidious cross-examination.

IV.

There was no evidence to support the verdict against the petitioner which merely showed that the petitioner who specialized in federal practice, appeared as defense counsel with Glasser as his adversary in the trial of alcohol cases some of which were referred to the petitioner for trial by other lawyers. The petitioner contends that the verdict is based on unfounded inferences and suspicion brought about by the misconduct of the judge and prosecutor. No inference of guilt can be drawn from the mere fact that attorney Kretske referred a few cases to the petitioner to be tried. It is seriously contended that this is the only reason the petitioner was made a defendant in this case. He was a necessary victim in a plot to "get" Glasser.

V.

There is no affirmative showing in the record that the indictment was returned in open court by a grand jury and since such a showing is jurisdictional the judgment is void. The endorsements on the indictment "filed in open court" on a certain date does not meet the legal requirements that it was returned in open court.

VI.

The charging part of the indictment is in the most general terms. It attempts to charge generally in a drag net style a conspiracy to defraud the United States of the conscientious services of a United States attorney or an assistant United States attorney in certain questions, matters, causes and proceedings but does not name the United States attorney or the assistant. It does not particularize the fraud or describe the acts constituting fraud or particularize the certain questions, matters, causes and proceedings. The indictment is fatally defective because it is vague, indefinite and uncertain.

It also attempts to charge a conspiracy to commit the substance offense of bribery of a United States officer almost word for word in the language of Title 18 U. S. C. sec. 91, an offense necessarily involving concerted action and therefore the charge of conspiracy will not lie.

VII.

The appointment by the trial court of Glasser's counsel over his objection on the ground of adverse interests to also represent co-defendant Kretske was a denial of effective assistance of counsel and since this is a conspiracy case the error complained of is available to the petitioner.

VIII.

The Illinois law effective July 1, 1939 made it mandatory to include women on jury service. The clerk of the court and jury commissioner deliberately excluded females from federal jury service when drawing the September 1939 grand jury. The federal statutes provide that jurors in the courts of the United States shall have the same qualifications as in the highest courts of law in the respective states when summoned for service in the courts of the United States, and since the September 1939 grand jury was summoned subsequent to the time the law became effective in Illinois making it mandatory to place females on juries, the September 1939 grand jury was illegally constituted and void.

ARGUMENT.

I.

The jury was packed by the illegal delegation of the duties by the clerk and jury commissioner, which violated the petitioner's right to a fair and impartial trial.

Affidavits (R. 1049-1051, 1057) filed (R. 1046) in support of the motion for a new trial, state that all the females placed in the box from which the petit jury in this cause was drawn were presented to the clerk of the court, who is one of the jury commissioners, by the Illinois League of Women Voters; that the list had been previously prepared by said league of women voters; that the females otherwise qualified and eligible for jury service were deliberately excluded from the box; that the females selected by said league had attended jury classes maintained for the purpose of giving instructions to potential jurors; that lectures before the jury classes presented the views of the prosecution; that females empanelled to try the petitioner were selected from said list; that knowledge of the above was acquired after verdict. It is to be especially noted that the affidavit of Glasser affirmatively states facts showing prejudice, viz., that all the women whose names were presented "had attended jury classes where lectures presented views of the prosecution" (R. 1050-1051).

The foregoing was formally brought to the attention of the trial judge at the earliest possible moment the facts became known to the petitioner in support of the motion for a new trial and arrest of judgment (R. 1046). An offer of proof was contained in Glasser's affidavit (R. 1051).

Since the allegations in the affidavits were in no way controverted either by counter-affidavit or even by a formal denial of grounds assigned, they were to be accepted as true for the purpose of the motion, *Neal* v. *Delaware*, 103 U. S. 370, 395-396; *Ogden* v. *United States*, 112 Fed. 523, 526-527. (C.C.A. 3).

By statute, at least 300 names are required to be placed in the jury box from which a venire is drawn; and those names are required to be selected by the clerk and a jury commissioner. Judicial Code, sec. 276, 28 U. S. C. sec. 412 (Appendix p. 75); *United States* v. *Murphy*, 224 Fed. 554, 562. (D. C., N. Y.).

Glasser's affidavit (R. 1050) states that of the 100-persons venire 47 were female and 53 were male. Since it is shown that the names of all females were presented by the Illinois League of Women Voters, it follows that, as to approximately one-half of the names placed in the jury box, selection was made not by the clerk or the jury commissioner but by a single unauthorized private organization. No other person or official has the right to participate in such selection. *Dunn* v. *United States*, 238 Fed. 508, 512 (C. C. A. 5); *United States* v. *Murphy*, 224 Fed. 554, 560, 561, 566 (D. C. N. Y.); *In re Petition for Special Grand Jury*, 50 F. 2d 973 (D. C. Pa.).

No degree of selectivity was exercised by the clerk and jury commissioner. It is clear that they completely abdicated their function in the selection of a jury list.

This is not a case that involves the mere solicitation by the clerk of information from varied sources preliminary to selection by the clerk, cf. *Walker* v. *United States*, 93 F. 2d 383, 390-391, cert. denied 303 U. S. 644. In the instant case, a group prepared and presented a list of names from their membership who had attended jury classes, all of which names were placed in the box (R. 1050, 1057).

The limitation of the body of citizenship from which female jurors were selected struck at the very fundamental right of trial by jury and so perverted that right so as to amount to no jury at all.

It is respectfully submitted that the right to a fair and impartial trial is a substantial right guaranteed by the Sixth Amendment of the United States Constitution and to deny such a right constitutes an abuse of discretion.

In *Norris* v. *Alabama*, 294 U. S. 587, this Court held that it was a denial of the equal protection of the laws, contrary to the Fourteenth Amendment to exclude all persons of the African race, solely because of their color, from serving as grand or petit jurors. In the instant case all females not members of a private league of women voters were excluded from petit jury service.

"It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith* v. *Texas*, 61 S. Ct. 164, 165. The limitation of female jurors to a particular organization as in the instant case is not truly representative of the community.

"Indictment by grand jury and trial by jury, cease to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races, otherwise qualified to serve as jurors in a community, are excluded as such from jury service." *Pierre* v. *State of Louisiana*, 306 U. S. 354, 358. In the instant case females as a class, not members of a private league of women voters were excluded from jury service.

It is respectfully submitted that the trial court abused its discretion in failing to grant the petitioner a new trial because of the packing of the jury, and that the Circuit Court of Appeals erred in holding that it did not abuse its discretion.

II.

The acts and conduct of the trial judge prejudiced the petitioner's right to a fair and impartial trial.

A defendant is entitled to a fair trial on the charges preferred against him. In order that our judicial system and practice be vindicated utmost care is required that no ruling or comment by the court take place which would have the effect of communicating to the jury an impression that the court was unfavorable to the defendant.

The gross abuse of his position by the trial judge appears throughout the record.

(a) Cross examining petitioner in a manner and making remarks injurious to petitioner's credibility and defense.

During the cross-examination of petitioner after he had answered a question put by the prosecutor, the trial judge remarked, "He, (meaning the petitioner) has a lot of last answers" (R. 878).

The remark coming as it did during the most vital part of petitioner's defense, while testifying in his own behalf, fatally deprived the petitioner of the benefit of his testimony by conveying to the jury the impression that the testimony of the petitioner was untrue.

The trial judge interrupted the cross-examination of the petitioner and when the petitioner could not exactly fix a certain time remarked, "Well why don't you say so" (R. 877).

Again during cross-examination when the petitioner was asked if he had a certain conversation with Mr. Bailey to which the petitioner replied he would not know, the judge

remarked, "Well, just say so then" (R. 877). The attitude of the trial judge is reflected in the above remarks and because of them the jury necessarily would indulge in adverse inferences and conclusions.

There is a burden upon the district attorney as a quasi judicial officer to aid and maintain the proper judicial atmosphere. Browbeating witnesses and argumentiveness has been condemned by this Court in *Berger* v. *United States*, 295 U. S. 78.

When counsel for petitioner objected to the prosecutor yelling at the witness the following occurred:

> Mr. Poust: Mr. Roth is not deaf and neither are the jury. There is no cause for Mr. McGreal to yell at the witness.
>
> The Court: That is his method of cross-examining. He may proceed.
>
> Mr. Poust: I noticed when they cross-examined the Judge they did not yell.
>
> The Court: Mr. McGreal is not cross-examining a Judge. I have observed Mr. McGreal's method of cross-examination and he may proceed (R. 863).

The remark of the trial judge, "Mr. McGreal is not cross-examining a Judge," created the inference that the petitioner was not entitled to the same consideration as other witnesses and detracted from the weight of his testimony.

> "It is important that hostile comment by the Judge should not render vain the privilege of the accused to testify in his own behalf." *Quercia* v. *United States*, 289 U. S. 466, 470.

Glasser represented the Government in the trial of a civil case, *United States* v. *About 151 Acres of land, etc.*,

involving a libel to forfeit a farm and personal property as the result of a seizure of an illicit still. Attorney Baker represented the claimants (R. 749). The Government was victorious in the trial court and the petitioner was engaged to prosecute an appeal. On cross-examination of the petitioner concerning this case, the prosecutor inquired whether, or not, Glasser would be required to disclose all the evidence the Government had in the criminal case, arising out of the still seizure, while trying the civil case. The petitioner said that he did not know if Glasser had done this (R. 870). The trial judge then stated, "You examined the case and the record on appeal, you must have, if you made the appeal. Then you know just as much about it as if you were present in court" (R. 870).

Examination of the record of the trial of the civil case of course would not disclose whether, or not, Glasser had disclosed all the evidence in his possession, concerning the criminal case growing out of the still seizure. The inquiry was immaterial. Nevertheless, by the trial judge's remarks, the jury doubtless received the impression that Glasser wrongfully concealed and withheld evidence and that the petitioner was endeavoring to protect Glasser in his testimony.

(b) Examining witnesses in a manner and making remarks favorable to the prosecution and prejudicial to the accused.

The petitioner represented the claimant in a case involving a Chrysler Sedan which the Government sought to forfeit by libel proceedings. After District Judge Barnes testified in the instant case that the libel was tried on the agent's statement, as is frequently done (R. 717-718) and after the petitioner had also testified on cross-examination that the case was tried on the agent's statement (R. 838), the judge asked the petitioner the following question:

"Was any witness sworn or testimony taken?" This question, which necessarily compelled the answer of "No," (R.873) since the case was tried on the agent's report, deprived the petitioner of the benefit of District Judge Barnes' testimony and implied that it was necessary that witnesses be sworn or testimony taken in the federal court in order that a case be disposed of, and because no witness was sworn or testimony taken, some irregularity existed in the manner in which the case was tried.

A still was seized at 6949 Stony Island Avenue in Chicago and as a result thereof, Elmer Swanson, Anthony Hodorowicz and Clem Dowiat were indicted. After indictment Swanson, Hodorowicz and Dowiat were called before District Judge Woodward to be arraigned and for the purpose of entering their pleas and setting the case for trial (R. 235-236, 836).

This was the one and only time that the case was called. This case was stricken from the docket with leave to reinstate a week prior to the date set for trial, at the direction of the investigator in charge of the alcohol tax unit agents and was pending at the time of the instant trial (Exhibit 226, R. 1034). Since there was only an arraignment before Judge Woodward, at which time a plea of not guilty was entered, it would of course be improper for either prosecutor or defense counsel to make any statement of fact with reference to the case (R. 918-920).

Nevertheless, the trial judge examined Swanson (one of the defendants in the Stony Island Avenue Still case) in a manner detrimental to the defense by stating in a declarative question "The case just dropped out of mid air" (R. 232).

The trial judge interrupted the examination of Anthony Hodorowicz, another defendant in the Stony Island Avenue Still case and persisted in treating the arraignment as

though it had been a trial (R. 236, 344, 348), by the following examination:

Q. Was there a full disclosure of facts made before Judge Woodward, as to your connection in that case?

A. No, not that I heard of. I was sitting at the bench.

Q. Were you called before the Judge at any time?

A. Just to mention our names, to be present.

Q. The Judge did not ask you any questions?

A. No.

Q. The lawyers didn't ask you any questions in front of the Judge?

A. No.

Q. Did Mr. Glasser ask you anything in front of the Judge?

A. No.

Q. So you don't know, your recollection is that there was not a complete disclosure of all the facts that connected you with that case, before the Judge?

A. It was all in front of the Commissioner.

The Court: That is all (R. 348).

There was only one appearance before Judge Woodward and that was the arraignment at which time of course, no facts could be stated to the court. The effect of the examination by the trial judge, however, created the inference that Glasser and the petitioner were derelict in their duty in the withholding of facts from Judge Woodward.

During the re-direct examination of Anthony Hodorowicz in spite of the showing in the record that the indictment against the witness was still pending, (R. 236, 317, 837, 918-921) the case had been merely struck from the

docket with leave to reinstate—the trial judge summed up and repeated some of the contentions of the Government as if conclusive against the petitioner by the following:

> "The Court: Q. You were never convicted, never paid a fine, and never went to jail?
>
> "A. No" (R. 346).

The answer of the witness although truthful, conveyed to the jury the impression that the witness Anthony Hodorowicz should have been convicted, paid a fine, or gone to jail, this in spite of the fact that Anthony Hodorowicz himself as a Government witness testified that he was not guilty of the offense charged (R. 343, 347) and the further fact that the case is still pending (Exhibit 226, R. 1034).

> "The impartiality of the Judge—his avoidance of the appearance of becoming the advocate of either one side or the other of the pending controversy which is required by the conflict of the evidence to be finally submitted to the jury—is a fundamental and essential rule of especial importance in criminal cases." *Adler* v. *United States*, 182 Fed. 464, 472 (C. C. A. 5).

When Edward Wroblewski, a Government witness, testified that the petitioner was his lawyer and he had testified in response to the prosecutor's questions that he did not remember how he happened to go to the petitioner, the court conducted a lengthy cross-examination (R. 644-646):

> Q. What is that?
>
> A. I don't remember how I met Mr. Roth.
>
> Q. How many lawyers have you hired in your lifetime?
>
> A. Two.

Q. Who were they?

A. Three.

Q. Who were they?

A. Mr. Bolton, Mr. Roth and Mr. Gutgsell.

Q. Did you hire Mr. Roth before you hired the other two?

A. After.

Q. After. Well, you must have some recollection of the circumstance concerning the employment of Mr. Roth; now, tell us about it.

A. I don't quite understand your question.

Q. You know something about how you happened to hire Mr. Roth, now tell us the story about it.

A. Well, I don't know, as I say, I don't remember how I got acquainted with Mr. Roth.

Q. How did you get acquainted with him?

A. I don't remember that.

Q. When did you first see him? Where did you first see him?

A. In his office.

Q. In his office?

A. Yes.

Q. How did you happen to go to his office?

A. I don't know.

Q. What is that?

A. I don't remember, Your Honor.

Q. When was this?

A. For this trial, in 1937, I think it was.

Q. In 1937?

A. Yes, sir.

Q. Did somebody take you to his office?

A. I don't remember.

Q. How old are you?

A. 31.

Q. And what education have you had?

A. Two years high school.

Q. What is that?

A. Two years high school.

Q. And you don't want to tell us now, how you got to Mr. Roth's office?

A. Your Honor, I don't remember.

Q. Why don't you remember? Is there any reason why you should not remember?

A. No reason. I just don't remember.

Q. Did your brother take you there?

A. I don't remember.

Q. How old are you now?

A. Past 31.

Q. How old is your brother?

A. 28.

Q. What is that?

A. 28.

Q. You are 31?

A. Yes, your Honor.

Q. Mr. Roth represented you in Indiana?

A. Yes, sir.

Q. For the trial?

A. Yes, sir.

Q. And at that time you were convicted?

A. Yes.

Q. In a trial before the Court and Jury?

A. Yes, your Honor.

Q. How much did you pay Mr. Roth?

A. $250.00.

Q. $250.00. And you don't know how you got up to his office?

A. I don't know now how I ever got acquainted.

Q. Nobody recommended him to you?

A. No, sir, I don't remember whether it was a rumor about his name.

Q. What is that?

A. A rumor. I don't remember how I met Mr. Roth.

This lengthy cross-examination of a Government witness would have been highly improper had it been conducted by the prosecutor. The engagement of the petitioner by the witness was in connection with a case not in issue in the instant trial.

This cross-examination by the trial judge created the prejudicial inference that the witness was concealing something concerning the petitioner and that there was something irregular about his engagement.

Another instance of the prejudicial attitude of the trial judge was shown when he interrupted the cross-examination of Kretske and by his questioning led the jury to believe that there was some irregularity about Kretske's conduct in obtaining the assistance of the petitioner in the trial of alcohol cases, none of which Kretske had ever tried, either for the Government when an Assistant United States Attorney or for the defense (R. 816-817).

In continuing the cross-examination of Kretske, the trial judge stated that there was nothing difficult about the trial of alcohol cases (R. 816).

That many complex questions are presented in the trial of any case whether it be alcohol, narcotic, mail fraud, counterfeiting or any other violation cannot be doubted. The harmful effect of the statement of the trial judge cannot be overemphasized.

(c) In making statements of alleged fact based on his personal knowledge.

The most casual examination of this record will show many instances in which the trial judge undertook the function both of a witness and a prosecutor.

The judge clearly implied to the jury that he had personal knowledge of the facts which he thought were relevant and material to the issues then being tried. During the examination of Glasser without any previous reference having been made thereto, the trial judge cross-examined Glasser in regard to a certain Nick Abosketes as follows:

> The Court: Did you know at that time that Nick Abosketes was under indictment in the Eastern and Western Districts of Wisconsin?
>
> A. No, sir.
>
> Q. Did you make any inquiry?
>
> A. No, sir; you see, my job was strictly to prosecute.
>
> Q. You were interested in getting Nick Abosketes?
>
> A. Yes, sir (R. 941).

At R. 943 the judge re-emphasized this matter as follows: "I think my impression was that there were two indictments pending in Wisconsin against Nick Abosketes on February 25, 1938. I will ask the District Attorney's Office to check with the Alcohol Division sometime during the day, to make sure about it."

At R. 1030, the judge said: "At my request, the Government has furnished me with this. Let the record show that

Nick Abosketes was indicted in the Western District of Wisconsin on January 27, 1936, and that he was indicted in the Eastern District of Wisconsin on July 30, 1938." • • • "To the indictment in the Western District he pled guilty and was sentenced." • • • "After that the indictment in the Eastern District was dismissed. It covers the same subject. I know that for a fact." • • • "I happen to know all about Nick Abosketes."

The law is well settled that the trial judge should not assume the role either of an advocate or witness for the prosecution.

Quercia v. *United States*, 289 U. S. 466.
Terrell v. *United States*, 6 F. 2d 498 (C.C.A. 4).
Williams v. *United States*, 93 F. 2d 685 (C.C.A. 9).
Frantz v. *United States*, 62 F. 2d 737 (C.C.A. 6).

(d) Limiting the right of cross examination to show bias, reward by and the coercive effect of Government officers.

Government witness Swanson was under indictment in the federal courts in Illinois and Ohio (R. 232, 238). He testified to having had interviews with agent Bailey, who was active in bringing about the present prosecution (R. 712). Swanson was asked the following question on cross-examination: "Well, he (meaning Bailey) could get that case called (for trial) or having something to do with it." The court sustained the objection of the prosecution and stated, "That is entirely out of order. Mr. Bailey is not running the courts down in Cleveland" (R. 237). The purpose of the question obviously was not as the trial court seemed to think, that Bailey was not running the courts in Cleveland, but to show the state of mind of the witness as cross-examination possibly might develop—that his testimony was biased because he was under the coercive

effect of the officers of the United States who were party to the present prosecution.

On July 19, 1939, Government witness Dewes was sentenced to be confined in a penitentiary for a period of two years. On July 27, 1939, while still detailed in Chicago, he gave the Government a statement (Exhibit 114, R. 551). He was brought back from Leavenworth Penitentiary and lodged in the county jail at Chicago on September 6 or 7, 1939, where he was held 7 or 8 weeks, during which time he was brought to the Federal Building about twenty times. Then he was taken to Milan, Michigan, from whence he was brought to testify (R. 554). At the trial he testified to matters not given in his statement of July 27, 1939.

He was asked, on cross-examination, whether or not he was not at Milan, Michigan. The court in sustaining the prosecutor's objection, stated, "They are both Federal penitentiaries." When further asked on cross-examination—"Isn't it a fact that you are in what is known as a reformatory now," the court sustained the prosecutor's objection and stated, "You are in the Milan penitentiary now." The witness then said, "Yes, sir" (R. 555). The cross-examiner's purpose was to show that the prisoner had received favorable treatment in return for his testimony by being detained at Milan, Michigan, a federal reformatory, when he had been sentenced to confinement in a penitentiary.

Cross-examination is a matter of right. It is prejudicial error to limit cross-examination of a Government witness when the purpose of cross-examination is to show bias, coercion of situation, or expectation or hope of reward.

Alford v. *United States*, 282, U. S. 687.

Farkas v. *United States*, 2 F. 2d 644, 647 (C. C. A. 2).

King v. *United States*, 112 Fed. 988, 995, 996 (C. C. A. 5).
Collenger v. *United States*, 50 F. 2d 345, 350, 351 (C. C. A. 7).
Cossack v. *United States*, 63 F. 2d 511, 516 (C. C. A. 9).
Asgill v. *United States*, 60 F. 2d 776 (C. C. A. 4).
Minner v. *United States*, 57 F. 2d 506 (C. C. A. 10).
Heard v. *United States*, 255 Fed. 829 (C. C. A. 8).

Mr. William Campbell, the District Attorney for the Northern District of Illinois, testified as a witness in rebuttal, and was required by Mr. Ward, the prosecutor, to give a yes or no answer to the question, "Q. At that time did you, preceding Mr. Glasser's entering the grand jury room to testify as a witness, have a conversation with him in which you used the following language—'Dan, I knew you were going into the grand jury room this morning and I thought I would go in and put in a good word for you. I wanted to tell the grand jury there was nothing in your official conduct that would require investigation' " (R. 1041). Mr. Campbell at first replied, "I had a conversation with him—" Mr. Ward interrupted, "Q. Did you make that statement? A. I did not. Mr. Ward: Cross-examine."

Whereupon Mr. Stewart stated, "Now, your Honor, we had this discussion in chambers and the record does not show our talk there. Is it your Honor's ruling that on cross-examination I am limited to what he just stated now? The Court: That is all. Mr. Stewart: Because, if I am not, I would like to go into other matters to show which is most likely true— The Court: No, you are limited to it. Mr. Stewart: If I am so limited there is no cross-examination."

It is evident that Mr. Campbell and Glasser had a conversation similar to the one narrated by Glasser, as Mr. Campbell began to describe a conversation before being stopped by Mr. Ward. By the ruling of the court the defense was prevented from attempting to show by cross-examination of Mr. Campbell that he made remarks substantially similar to those testified to by Glasser. Defense counsel were also prevented by this ruling from attempting to refresh Mr. Campbell's recollection regarding the alleged matter and were also prevented from inquiring as to whether or not the witness had ever made any statements inconsistent with his denial of this conversation.

> "Cross-examination should be allowed as to details corroborative of defense contentions." *Dist. of Co.* v. *Clawans*, 300 U. S. 617, 632.

(e) In admitting in evidence Government agents' reports containing the criminal history of a co-defendant and ex parte statements tending to involve the co-defendant in a violation of the law.

Exhibits 81 and 113 introduced in evidence (R. 532, 533) contain a statement of various investigators' reports and the proposed testimony of witnesses, tending to implicate the defendant, Kaplan, in connection with the operation of illicit distilleries.

At the very beginning of Exhibit 81 before it enters into a detailed discussion of the investigation, there appears the characterization of the defendant, Kaplan, as follows:

> "Louis Kaplan, 3125 W. 19th St., Chicago, Illinois, male, white, Jewish descent, age 55, height 5 ft. 8 inches, weight 215 pounds, stocky build, married, citizenship not known; owns and operates the Kaplan Motor Sales Company, 3152 Ogden Ave., Chicago, Illinois. (Automobile sales agency for the Nash car.)

Reported to be worth approximately $200,000.00, criminal record not known with exception of his reputation as a bootlegger in Chicago, Illinois. (A Louis Kaplan was arrested at 616 W. Madison St., Chicago, Ill., for violation of the National Prohibition Act on May 10, 1923, and sentenced to pay a fine of $300.00; a man by the same name was also arrested by Chicago Police officers February 7, 1935, together with one Edward Dewes, in connection with the killing of Tony Pinna and seriously wounding Vito Messino at Louis Kaplan's garage, 3152 Ogden Ave., Chicago, Ill., in which Louis Kaplan stated he was a victim of an attempted kidnapping and was released)."

That portion of the statement tending to implicate Kaplan in connection with the operation of an illicit distillery is hearsay of the most pronounced type and a denial of the Constitutional right to be confronted with witnesses. But a more serious question arises in the characterization of Kaplan, by the agent making the report, as a reputed bootlegger worth $200,000.00, and that he had been arrested for murder and that he was sentenced to pay a fine for violation of the National Prohibition Act. This was highly prejudicial, inflammatory and constituted hearsay and was reversible error. *United States* v. *Dressler*, 112 F. 2d 972, (C. C. A. 7); *Brady* v. *United States*, 39 F. 2d 312 C. C. A. 8); and error as to one defendant in a conspiracy case is error as to all. *Logan* v. *United States*, 144 U. S. 263. Immediately after the exhibit was read to the jury a motion was made to withdraw a juror and declare a mistrial. This was timely, and preserved the point, *Pharr* v. *United States*. 48 F. 2d 627 (C. C. A. 6). The same characterization of Kaplan appeared in Exhibit 113, which was an agent's report implicating Kaplan in another illicit distillery.

The exhibits were not introduced for the purpose of notice to Glasser that he had a case to present to the grand

jury and to attempt to prove that he had not done so. It was not contended that he did not present the cases. The evidence of the Government shows that he did present them (R. 528-529).

> "It is vastly more important that the attitude of the trial judge should be impartial than any particular defendant however guilty he may be, should be convicted. It is too much to expect of human nature that a judge can actively and vigorously aid in the prosecution and at the same time appear to the laymen on the jury to be impartial". *Williams* v. *United States*, 93 F. 2d 685, 694.

See also:

> *Hunter* v. *United States*, 62 F. 2d 217 (C. C. A. 5).
> *Frantz* v. *United States*, 62 F. 2d 737 (C. C. A. 6).
> *Adler* v. *United States*, 182 F. 464 (C. C. A. 5).

It is respectfully submitted that petitioner was deprived of a fair and impartial trial because of the acts and conduct of the trial judge.

III.

The prosecutor throughout the trial was guilty of misconduct and violated the rights of the petitioner to a fair and impartial trial.

In *Berger* v. *United States*, 296 U. S. 78, in commenting on the duties of the prosecutor, at page 88 this Court said:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore in a criminal prosecution is not that it shall win a case, but that justice shall be

done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

"Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronouncenced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded."

The violations by the prosecuting attorneys of proper procedure in the conduct of the trial and introduction of evidence were so numerous that space does not permit of separate argument regarding each of them. Therefore, leave of Court is asked to submit brief mention of some of these instances in a single section of this brief as follows:

Prosecutor McGreal cross-examined petitioner at great length as to the disposition of the Chrysler Sedan case (R. 871-875). Prosecutor Ward on re-cross examination again questioned petitioner as to the Chrysler Sedan case (R. 882-884). Objection was made by defense counsel to the repetition of cross-examination and to the changing of cross-examiners at which time the following occurred:

Mr. McGreal (the first cross-examiner): May I answer that, your Honor?

The Court: You won't need to. Objection overruled. Proceed (R. 882).

This dwelling on the One Chrysler Sedan case by repeated cross-examination was injurious to petitioner and evidently caused by the desire of the prosecution to overcome Judge Barnes' testimony. In addition, the prosecution later took advantage of this ruling of the judge to change examiners on cross-examination of Glasser and to cover at length many of the subjects of his first cross-examination after an intermission of Saturday and Sunday when the second cross-examiner had had the opportunity of going over the record and endeavored to improve upon the first cross-examination with the aid of this additional facility. The arbitrary ruling of the court obviously violated the petitioners fundamental rights.

During this objectionable cross-examination of the petitioner the prosecutor still dwelling on the One Crysler Sedan case, required petitioner to answer the legal question that if a variance had existed Glasser would have had a right to amend the pleading and that Glasser did not ask leave of Judge Barnes to amend the pleading. There was no question of variance ever raised or suggested in the One Chrysler Sedan case and the only purpose and effect of this improper cross-examination of petitioner was to raise the inference that the automobile case had been decided on the ground of variance and that Glasser had failed to perform his duty in not endeavoring to amend the pleading (R. 883). Similar unfounded inferences are frequent throughout the record. See *United States* v. *Perlstein*, 120 F. (2d) 276, 283.

It plainly appears that the prosecutor was again misleading the jury with unfounded inferences when United States Commissioner Walker, called as a Government witness, testified that he discharged the defendant in the Kwiatowski case on a finding of no probable cause shown (R. 289). The Government's evidence showed that all the evidence

in its possession was disclosed to the commissioner at the hearing of the case (R. 397-398). In spite of this, the prosecutor stated in a declarative question, "It does not mean that there may not be probable cause but that it was not shown to you?" (R. 289). By this latter unfounded question not based on any evidence in the record, or even a suspicion, the prosecutor made it appear to the jury that Glasser had witheld material evidence in the presentation of this case. This course of conduct was vigorously denounced by this Court in *Berger* v. *United States,* 296 U. S. 78, 88, where it was held "But, while he (the prosecutor) may strike hard blows, he is not at liberty to strike foul ones."

The extreme length to which the prosecutor was forced to go in order to obtain a conviction in this case is shown by his attempt to obtain any kind of damaging presumptions by unsuccessfully attempting to put words into the mouth of the prosecution witness, Wm. Wroblewski as follows:

> Q. Well, now would it refresh your recollection if I was to call your attention to a statement that you made to Mr. Devereaux and Mr. Bailey on August 3, 1939, in which you said, "On one occasion while I was in Roth's office, he, Kretske, said to me if I had any cases fixed, don't talk about them or you will get into some trouble." Do you remember that?
>
> A. I don't believe it was Kretske.
>
> Q. Who told you that?
>
> A. Well, the way that came out. I went down to see Mr. Al Roth, and told him that I was having trouble with the law. I said that the law is looking for some information from me, and Mr. Al Roth told me if I gave information to anybody I would be implicated in the case.

Q. Was it he used the word "implicated"?

A. That is right.

Q. So that was an occasion when you were in Roth's office that Mr. Roth said that to you?

A. Yes, sir.

Q. Now, are you sure he didn't say: "if you had any case fixed, don't talk about them, or you will get into more trouble"? That he didn't use that language?

A. Well, I might have expressed myself that way at the time, but I recall now that the right way is implicated.

Q. Implicated?

A. Yes, sir (R. 636).

This questioning made it appear to the jury that Wm. Wroblewski had a conversation with Kretske concerning fixing cases and when the prosecutor failed in his attempt to have the witness so state, tried to have the witness state that the petitioner had such a conversation, when all the witness testified to, was that petitioner as his counsel advised him of his Constitutional right against self incrimination.

The persistent misconduct of the prosecutor is further emphasized during the examination of his witness Dukatt.

Harry Dukatt was indicted for an alcohol violation and thereafter engaged petitioner to represent him. The petitioner together with his client Dukatt, called at the clerk's office to examine the indictment (R. 861).

An examination of the indictment disclosed that it carried a conspiracy count with a number of overt acts. The seventh overt act being in words and figures as follows: "That on, to wit, April 15, 1938 at, to wit, Chicago, Illinois,

Harry Dukatt, convoyed certain Andy's Motor Service Trucks'' (Exhibit 196, R. 880).

The vicious attempt by the prosecutor to inject the prejudicial inference that petitioner was in possession of a confidential Government report is disclosed by the following examination of Dukatt:

Q. You looked at some file?

A. Well, I didn't look at any file, he just was showing something about an indictment, what I was indicted for, and I happened to see something about the Government following me.

Q. What?

A. I happened to see something when the Government men were following me.

Q. You mean you read a report?

A. Well, I didn't have any report. He was shown some papers about my indictment and I happened to glance over it and seen a few words concerning me.

Q. You saw something about the Government following you?

A. Yes, sir.

Q. You don't know whether that was indictment or not, do you?

A. I couldn't tell you that.

Q. Did you see Mr. Roth making a lot of notes at that time?

A. I don't know how many notes he made, I wouldn't say how many notes he made.

Q. That was just to refresh your recollection at the time, does that refresh your recollection?

A. He wrote something down.

Q. Well, you knew at that time it was an officer's report, didn't you?

A. Well, I really don't know what it really was. I wanted to know what I was indicted for.

Q. Well, would this refresh your recollection? (Handing document to witness.) In other words, I have the report, I was reading here, the officer's report of the investigation, the report, "As much as I saw seemed to be correct in stating my movements". Does that refresh your recollection?

A. Well, there were a few times I happened to see where the government followed me, that happened to refresh my memory, seeing it was me, that is about all I remember.

Q. Now, on the second case that you had, did you have any discussion with Mr. Roth about probation?

A. Well, I had him handle both cases for me.

Q. The case you had before Judge Holly?

A. Yes, sir.

Q. Mr. Roth discussed probation with you?

A. That is the only thing.

Q. Keep your voice up.

A. The only thing Mr. Roth discussed with me was he thought I had a good chance to get probation, because I was never indicted before in my life at any time with any crime, but he wouldn't guarantee me nothing.

Mr. Ward: Will you mark this Exhibit 158? (Document so marked).

Mr. Ward: Q. Will you look at this, as being part of a report in your case, does that look like the report you were reading from with Mr. Roth?

A. Well, to be honest with you, I don't just remember, I don't know if it was this size of paper or larger, I don't remember, because I really didn't pay much attention at that time (R. 701-702).

It can plainly be seen from the testimony of Dukatt that petitioner and his client were examining the indictment in the Court files. Nevertheless, driven to desperation because of the lack of any evidence against the petitioner, the prosecutor was compelled to resort to the foully suggestive cross-examination of his own witness which was intended to convey to the jury the impression that petitioner and his client were examining a confidential agents report which presumably was in the possession of Glasser.

Conduct of this character, by the prosecutor was condemned in *Pharr* v. *United States*, 48 F. (2d) 767 (C. C. A. 6).

The bill of particulars in the instant case made no mention of the Chrysler Sedan case (R. 77-89). Nevertheless, when objection was made by defense counsel to the introduction of evidence relating thereto on the ground that the case was not in the bill of particulars, the prosecutor in order to induce the court to overrule the objection misstated to the court that the case was in the bill of particulars (R. 219).

It was highly important in the trial of this case to permit Glasser to examine files introduced in evidence by the prosecution so as to refresh his recollection. This would be very helpful to all defendants. During the cross-examination of Glasser he was questioned as to a few of the thousands of cases handled by him. The files relating thereto had already been put in evidence by the Government. Without authorization by the court, these exhibits were kept in the possession of the prosecutor who, although

ordered to show them to Glasser during a week end recess, refused to do so on the ground that Glasser was not accompanied by his attorney (R. 980, 982-983). In the first place the ordinary safeguarding of the interest of parties litigant requires that exhibits once submitted in evidence be retained in the possession of the clerk of the court. In any event it is clear that Glasser has an unqualified right to examine such exhibits. Here the denial of such right to Glasser forced him to state in truth, but with naturally prejudicial effect on the jury, that he did not remember the various cases referred to by the prosecuting attorney.

The callous disregard of the fundamental rights of an accused person, which characterizes the conduct of this case throughout on the part of the Government, is reflected in the surreptitious manner in which the Government submitted to the jury Exhibit 92. This was a pre-trial statement of Government witness Raubunas dated October 20, 1939, calculated to corroborate his testimony at the trial. The court sustained objection to its introduction (R. 712). It later developed, however, and clearly appears that this exhibit was included in a group of 33 exhibits submitted by the Government at the close of defendant's case and taken to the jury room (R. 1034).

That the prosecutor over-stepped the bounds and fairness which should characterize the conduct of such an officer in the prosecution of a criminal case is overwhelmingly shown by the invidious insinuation that United States District Judge Igoe, a witness for the defense, was acquainted with numerous persons of low character and violators of laws of the United States (R. 907-908).

The prosecutors throughout the trial violated the rights of the petitioner by interrogating witnesses with leading questions on material matters. Many of these questions contained several alleged statements of fact. These in-

stances were so numerous that it would unduly lengthen this brief to set them forth verbatim and leave is respectfully asked to refer to them by name of the witness and the page number of the record as follows:

Witness Swanson—Pages 226-227, 229-230-231.

Witness Del Rocco—Pages 244-245.

Witness Joseph Cole—Page 573.

Witness Ellis—Page 589.

Witness Wm. Brantman—Pages 659-660.

Witness Harry Dukatt—Page 703.

Witness Frank Hodorowicz—Pages 296, 301, 303-304-305-306.

Witness Ralph Sharp—Page 380.

Witness May Jurkas—Pages 612-613.

Witness Stanley Slesur—Page 623.

Witness Edward Wroblewski—Pages 674-675.

Witness Nick Abosketas—Page 673.

Witness E. L. Gates—Page 604.

In many instances the prosecutors committed prejudicial error by improper interrogation of Government witnesses on re-direct examination amounting in substance to cross-examination of their own witnesses. Leave is respectfully asked to refer to the witnesses and page numbers of the record, instead of setting forth the erroneous examination, which in some instances is quite lengthy.

Witness Workman—Pages 206, 209.

Witness Frank Hodorowicz—Page 341.

Witness Sharp—Page 380-381-382.

Witness Investigator Rossner—Pages 399, 405.

Witness Raubunas—Pages 521, 523.

It is respectfully submitted that the misconduct of the prosecutors in this case is by far greater than in *Berger* v. *United States*, 296 U. S. 78 where this Court reversed because of the misconduct of the prosecutor.

IV.

There was no evidence to support the verdict against the petitioner.

The substance of the evidence merely shows that petitioner, who specialized in federal practice (R. 883) handled four cases referred to him by Attorney Kretske (R. 874, 230, 861, 888), one by Attorney Baker (R. 749) and two by direct engagement of the clients (R. 858, 867), with Glasser appearing as his adversary in all of them.

1. United States v. One Chrysler Sedan.

In this referred case by Kretske, petitioner was engaged to represent the claimant, Rose Vitale, in an action brought by the United States to forfeit her automobile. Petitioner prepared and filed the necessary pleadings and on the trial date appeared before District Judge Barnes ready to proceed (R. 838).

The testimony of Judge Barnes, a defense witness is as follows:

> "Q. And the point involved here, Judge, is this. Were you sufficiently informed concerning the facts involved in that case to make a decision on the law and the evidence?
>
> A. Well, it is the agent's statement. They never testified to more than their statement. They try their cases frequently on their statements, and that statement is not sufficient to forfeit a car. The car was not

in the place where the still was, the car belonged to the wife, and I had no more right to take it than I had to take yours.

Q. And anything the agent might have said could not have changed that?

A. Well, he states in writing what he expected to prove. What he expected to swear to.

Q. And under these circumstances, you very often hear the cases without the actual testimony?

A. Very, very frequently.

Q. And did Mr. Roth appear to represent his client, and Mr. Glasser appear to represent the government in a proper fashion?

A. They not only appeared to, they did" (R. 718).

Surely there is nothing in the conduct of the petitioner that is not consistent with the honest conduct of a lawyer. He certainly had a right to accept employment in a referred case. There isn't room for a guess or surmise of misconduct of the petitioner.

2. United States v. Elmer Swanson, Anthony Hodorowicz and Clem Dowiat (6949 Stony Island Ave. still case).

Kretske referred the three defendants in this case to the petitioner for trial. When petitioner and his clients appeared before United States Commissioner Walker for a preliminary hearing, Glasser obtained a three week continuance over the vigorous objection of the petitioner (R. 295, 835). Glasser demanded the long continuance because the Government agent in charge of the investigators told him that he did not think they had enough evidence to win the case (R. 918-919). Nevertheless, the three clients were indicted before that had an opportunity to have their hearing before the Commissioner on the adjourned date. Pleas

of not guilty were entered to the indictment and the case was set for trial (R. 836).

When the petitioner and his clients after preparing for trial on May 2, 1938 (Exhibits 182, 183, 184, R. 831) appeared on the trial date, May 5, 1938, ready for trial, they learned that the case on April 28, 1938 had been stricken with leave to reinstate, without notice to either clients or their counsel (R. 235-236, 836, 837).

The uncontradicted testimony is that the case was stricken with leave to reinstate on motion of Glasser at the direction of the Government agent in charge of the investigators, who advised Glasser they did not have sufficient evidence to convict (R. 918-920). The record discloses the case as never having been reinstated (Exhibit 226, R. 1034) with Glasser out of office a year.

No inference that petitioner was guilty of any wrong doing can possibly be drawn from the fact that the investigator in charge of the Government agents directed Glasser to move to strike the case with leave to reinstate because of lack of evidence.

One would have to surmise or guess that because this case was referred to petitioner for trial, and that he accepted the employment, that he was involved in an unlawful conspiracy.

3. United States v. Edward Dewes.

The substance of the evidence is that Kretske referred Dewes to the petitioner to try his case. The petitioner prepared the case for trial, together with Dewes, his co-defendants, and their lawyers (R. 764). The case was tried by the petitioner and Dewes was convicted and sentenced to the penitentiary (R. 857-858, 868, 555).

Evidence of guilt cannot be inferred from accepting from another lawyer a case to be tried.

4. United States v. Harry Dukatt.

The substance of the evidence is that the petitioner represented Dukatt, who was referred to him by Kretske, in a hearing before the United States Commissioner, where he was discharged. Dukatt was indicted in two cases and entered a plea of guilty to both indictments, being represented by the petitioner, and was sentenced to the penitentiary (R. 700-701).

Again the Government seeks to infer misconduct from accepting a referred case from Kretske.

5. United States v. About 151 Acres of Land, etc.

The substance of the evidence in this case is that Attorney Baker tried the case in the District Court. The Government represented by Glasser was victorious. Thereafter Baker referred this case to the petitioner to prosecute an appeal (R. 749). The judgment of the lower court was reversed. 99 F. 2d 716. Petitioner represented one of the claimants who was indicted while the civil case was pending on appeal (R. 868-869) and was thereafter substituted by another lawyer who disposed of the criminal case (R. 880-881).

Again the Government seeks to infer misconduct because another lawyer referred a case to the petitioner. This evidence does not even rise to the dignity of a suspicion of misconduct.

6. United States v. Paul Svec.

The substance of the evidence is that the petitioner represented Svec in two criminal cases, Glasser prosecuting. On the trial of the first case Svec was convicted and sentenced to the penitentiary (R. 566). On appeal taken from this conviction the judgment of the lower court was affirmed. While Svec was at large on an appeal bond he was

again arrested and charged with another offense and after a full hearing before the United States Commissioner was discharged (R. 557, 568).

Certainly no inference of misconduct can be drawn from the fact that petitioner was engaged to represent Svec in two cases.

7. United States v. Frank Hodorowicz, Mike Hodorowicz, Pete Hodorwicz and Clem Dowiat.

In this case the substance of the evidence merely shows that after appearing on behalf of the defendants on arraignment the petitioner conferred with Glasser as to his attitude on a plea of guilty and was advised that his attitude was that of the imposition of a substantial penitentiary sentence (R. 858). Petitioner informed his clients of Glasser's attitude. Another attorney was substituted and all the defendants were convicted, Glasser prosecuting (R. 859).

One would have to resort to conjecture of the most pronounced kind to say that this is any evidence of an unlawful conspiracy. There is not one iota of evidence that the petitioner did anything that was inconsistent with the conduct of a lawyer performing his duties.

No inference of guilt can possibly be drawn from accepting the employment of defending alcohol cases or that Glasser represented the Government in cases when the petitioner was on the other side.

The testimony of Alexander Campbell, admitted over objection (R. 98, 680), which of course had nothing to do with any case in the Northern District of Illinois, that the petitioner went to see him in Indiana five months after the Wroblewskis had been indicted in the Northern District of Indiana to ask him if something could be done about not indicting the Wroblewskis in the Northern Dis-

trict of Indiana is incredible and contradicted, as the physical facts, the court records (Exhibits 186-A and 186-C, R. 840), correspondence (Exhibit 137, R. 842) and testimony (R. 676, 838, 840) show that the Wroblewskis were under indictment for five months in the Northern District of Indiana and that the petitioner and the Wroblewskis had knowledge of this fact at the time of the alleged conversation. The facts are more fully covered in the statement of the case pp. 10-12 and in the interest of brevity will not be repeated here.

A summary of all the evidence in connection with this entire case against this petitioner fails to establish the most essential element of a conspiracy case—namely an unlawful agreement. It is well established that where the evidence leaves the essential element of an unlawful agreement open to conjecture a verdict for the defendant should be directed. *Symonette* v. *United States*, 47 F. 2d 686, 688 (C. C. A. 5); *Dowdy* v. *United States*, 46 F. 2d 417, 423 (C. C. A. 4); *Linde* v. *United States*, 13 F. 2d 59, 61 (C. C. A. 8).

> "No inference of fact or of law is reliable drawn from premises which are uncertain." *United States* v. *Ross*, 92 U. S. 281, 283-284.

It is needless to state how noxious the repetitious employment of this device of inferences can become and how tragically unjust its results can be in a criminal case.

During the trial of the instant case the Government introduced evidence concerning other cases that Glasser handled in which his conduct was attacked, in which cases many other members of the local bar appeared as counsel opposing him (R. 198, 251, 256, 270, 299, 311, 325, 383, 411, 516, 556, 617, 632, 637, 696).

The petitioner sincerely contends that because he appeared in a few cases against Glasser, which were referred

to the petitioner by Kretske, petitioner was singled out as a necessary victim in this case in a desire to "get" Glasser (R. 948).

The evidence fails to establish any evidence of guilt. On the contrary, the evidence is convincing of the petitioner's innocence. The motion for a directed verdict of not guilty should have been sustained.

V.

To constitute a valid indictment for an infamous crime in a federal court, it must have been publicly presented in open court, the grand jurors present answering to their names, the indictment then being delivered by the foreman to the court and the fact entered in the record.

The record fails to show that the indictment was returned in open court by the grand jury. A motion to quash on this ground was made (R. 142, 149). The Government made a motion to strike (R. 150). The motion to quash was denied (R. 42).

The record shows that the September, 1939 grand jury was discharged on September 29, 1939 (R. 39) and there existed no record of the return of any indictments on that day. A new term of court commenced on October 2, 1939. Judicial Code, sec. 79, 28 U. S. C. sec. 152.

On October 30, 1939 there was created for the first time a purported record that the grand jury returned four indictments in open court on September 29, 1939, with the notation, "Added 10/30/39" (R. 39). It is significant to note that the purported record was made after October 12, 1939, when the petitioner was given leave to file a motion to quash (R. 40) and one day before the petitioner filed his motion to quash on October 31, 1939 (R. 40).

Under Rule 30 of the District Court, the motion was required to be served on the United States Attorney not later than 4:00 P. M. of the prior day, October 30.

The Circuit Court of Appeals, in holding that the record in this case was sufficient, stated that the face of the indictment contains the notation, "A true bill," "George A. Hancock, Foreman," and the statement, "Filed in open court this 29th day of September, A. D. 1939, Hoyt King, Clerk," and that the record before them shows that on September 29, 1939, at a regular term of the District Court of the United States for the Eastern Division of the Northern District of Illinois the grand jury returned four indictments in open court (R. 1119). The Circuit Court of Appeals obviously gave full force and effect to the record that four indictments were returned in open court on September 29, 1939, notwithstanding the notation, "Added 10/30/39," which is some thirty days after the discharge of the grand jury and with no showing in the record by what authority the addition to the record was made or that it in any way identified the indictment in the instant case.

The praecipe for the record (R. 132) called for a true and complete record of the return of the indictment and order to file same. All that was supplied appears in the record, page 38. No memorandum of any kind was furnished from which it might appear that the grand jury returned four indictments in open court on September 29, 1939, and that this petitioner was named as a defendant in any of them. Moreover, the unauthorized record created on "10/30/39" without notice, makes no mention of the persons against whom the four indictments were returned. There is nothing in the notation identifying the indictment in the instant case as one of the four indictments mentioned.

The first step to a valid indictment is that it was returned in open court by a grand jury authorized to return it. Next, the record should affirmatively show that fact.

This Court states the applicable rule in *Crain* v. *United States*, 162 U. S. 625, 644-645 as follows:

> "Neither sound reason nor public policy justifies any departure from settled principles applicable in criminal prosecution for infamous crimes. Even if there were a wide divergence among the authorities upon this subject (failure of record to show arraignment), safety lies in adherence to established modes of procedure devised for the security of life and liberty. Nor ought the courts, in their abhorrence of crime nor because of their anxiety to enforce the law against criminals, to countenance the careless manner in which the records of cases involving the life or liberty of an accused are often prepared. Before a court of last resort affirms a judgment of conviction of, at least, an infamous crime, it should appear, affirmatively, from the record that every step necessary to the validity of the sentence has been taken."

Without a valid indictment no valid sentence can be entered. Because there is no showing that the paper labeled indictment was returned in open court by a grand jury, the judgment is void.

The declaration of Amendment V to the Constitution, that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury" is jurisdictional. *Ex Parte Bain*, 121 U. S. 1.

There must be an affirmative showing in the record that the indictment was publicly returned in open court by

the grand jury and by its foreman delivered to the clerk. *Renigar* v. *United States,* 172 Fed. 646 (C. C. A. 4). *Angle* v. *United States,* 172 Fed. 658 (C. C. A. 4). *Yundt* v. *The People,* 65 Ill. 373. *Rainey* v. *The People,* 8 Ill. (3 Gil.) 71. *State* v. *Heaton,* 23 W. Va. 773.

The notation on an indictment, "Filed in open court" does not meet the legal requirement that the record show the *return* of the indictment in open court. *Felker* v. *State,* 54 Ark. 489.

In the *Felker* case the indictment bears the endorsement of the clerk "filed in open court on the 22nd day of February, 1890." This is similar to the endorsement in the instant case. The court held in the *Felker* case that where an indictment showed that it was filed in open court on a certain date, but it did not appear by the record that the indictment had been returned into court by a grand jury, such omission was fatal. To the same effect: *Renigar* v. *United States, supra; Kelly* v. *The People,* 39 Ill. 157.

It is respectfully submitted that the motion to quash the indictment on the ground assigned under this point should have been sustained.

VI.

(a) The indictment is vague, indefinite and uncertain and states the conclusion of the pleader, thereby failing to inform the petitioner of the nature and cause of the accusation.

A demurrer was interposed (R. 42-48) and overruled (R. 60)

In *United States* v. *Cruikshank,* 92 U. S. 588, 593, the requirements of a criminal pleading are clearly laid down:

> "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accu-

sation'. Amend. VI. In *U. S.* v. *Mills*, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and in *U. S.* v. *Cook*, 17 Wall. 174, 21 L. ed. 539, that 'Every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descent to particulars.' 1 Arch. Cr. Pr. and Pl. 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, and not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances."

The indictment in this case must stand or fall on the charging part as the means alleged formed no part of the charge. This elementary proposition of law is not disputed by the prosecutor who drew the indictment.[7] Indeed,

[7] The following quotation is from the argument of the prosecutor in defense of the indictment in the instant case in the Circuit Court of Appeals:

"In this particular case the means need not be set out at all because it can be seen that the conspiracy charged is unlawful and the means by which the unlaw act is to be accomplished is immaterial." (Gov. Br. p. 26, *United States* v. *Roth*, *No.* 7317 C. C. A. 7th.)

the Solicitor General in his brief in opposition to the petition for certiorari, page 26, likewise concedes that the detailing of means whereby a conspiracy was to be accomplished formed no part of the charge.

The charging part of count two of the indictment, paragraph 14 (R. 28) is as follows:

> "And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the defendants: Daniel D. Glasser, Norton I. Kretske, Anthony Horton, otherwise known as Tony Horton, Louis Kaplan and Alfred E. Roth, well knowing the premises aforesaid, in the City of Chicago, in the State and District aforesaid, and at other places to the said grand jurors unknown, heretofore, on, to wit, March 15, 1935, and thereafter continuously up to the date of the return of this indictment, in violation of the provisions of Section 88, Title 18, of the United States Code of Laws, did wilfully, unlawfully, and feloniously conspire, combine, confederate, and agree together, and with each other, and with divers other persons to the grand jurors unknown, to defraud the United States of and concerning its governmental function to be honestly, faithfully and dutifully represented in the courts of the United States by a United States Attorney or an Assistant United States Attorney to prosecute certain delinquents for crimes and offenses cognizable under the authority of the United States as the same should be presented and determined according to law and justice, free from corruption, improper influence, dishonesty or fraud, more particularly its right to a conscientious, faithful and honest representation of its interests in certain suits, controversies, proceedings, matters, actions, and causes brought and pending in the United States Courts in the Northern District of Illinois; that is to say, by promising, offer-

ing, causing and procuring to be promised and offered, money and other things of value to an officer of the United States, and to persons acting for and on behalf of the United States in an official function, under and by authority of a department and office of the Government of the United States, with intent to influence his decision and action on certain questions, matters, causes and proceedings which were at times pending, and which were by law brought before such officer or officers in his or their official capacity, and with the intent to influence such officer or officers to commit and aid in committing, and to collude in committing certain frauds on the United States, and to induce such officer or officers to do and to omit from doing certain acts in violation of his or their lawful duty;"

The said paragraph does not allege and inform the defendants who is meant by the "United States Attorney or an assistant United States Attorney"; what the "questions, matters, causes and proceedings" were concerning which the defendant conspired to influence the decision and action of "an officer of the United States and to persons acting for and on behalf of the United States" and and who were these officers and persons; or what the "certain frauds on the United States" were; nor does the said paragraph describe the certain acts which "such officer or officers" were "to do and to omit from doing in violation of his or their official duty."

The court, in passing on the demurrer, stated:

"The court is of the opinion that while the indictment is somewhat vague and indefinite, nevertheless it does charge the defendants with conspiracy to defraud the United States. However, I am of the opinion now that the defendants are entitled to a bill of

> particulars setting forth exactly what is charged and the times, places and persons involved. * * * that it is only right and proper, to lessen their burden of defense and so they may properly prepare, that they know definitely and in particular just exactly what they are charged with. This is not set out as definitely as it ought to be" (R. 160).

Where the indictment leaves a doubt in the mind of the Court concerning the offense intended to be charged it is fatally defective for uncertainty. *Bratton* v. *United States*, 73 F. 2d 795 (C. C. A. 10).

The Circuit Court of Appeals, in passing on the indictment, said:

> "To us it *seems* that the indictment sufficiently apprised the appellants of the charge against them" (R. 1122). (Italics supplied.)

In *McKenna* v. *United States*, 127 Fed. 88 (C. C. A. 6), the indictment was drawn under a statute punishing a conspiracy to injure, oppress, threaten or intimidate any citizen in the free exercise and enjoyment of any right or privilege secured to him by the Constitution or laws of the United States. The indictment charged that the defendants conspired to injure, etc., certain named persons, male citizens of Kentucky, over twenty years of age "in the free exercise and enjoyment of a right and privilege secured to them." It was held bad as indefinite, in that it failed to state what particular right and privilege was meant, though it continued with recitals that the defendants were officers of an election precinct and conspired "for the purposes aforesaid" and "to carry out and effect the object of the same" failed to open the polls promptly, and

by a tardy discharge of their duties and frequent absences prevented the persons named from voting.

It will be noted in the *McKenna* case, *supra,* the indictment was held bad because it failed to allege what right or privilege was meant though it continued with recitals and means. The instant case is by far worse in failing to name the district attorney or assistant district attorney or the officers, in failing to describe the questions, matters, causes and proceedings, in failing to allege what was the fraud, and in failing to allege what was done or omitted to be done in violation of an official duty.

In *Anderson* v. *United States,* 260 Fed. 557 (C. C. A. 8), the defendant was convicted and sentenced on an indictment, the charging part of which was as follows:

> "That R. Q. Ayers, W. C. Dabney, Melvin Anderson, Gene Johnston, E. L. Edwards, George Booker, Leon Harris, and Leonard Riddick, on the 8th day of November, in the year 1917, in the said division of said district, and within the jurisdiction of said court, did then and there unlawfully, willfully, and feloniously conspire, confederate, and agree among themselves to commit an offense against the United States; that is to say, to steal from a certain railroad freight car certain goods then and there moving as and constituting a part of an interstate shipment of freight, with the intent then and there to convert said goods to their own use."

In holding that the indictment was fatally defective and failed to comply with the rules of criminal pleading, the court at page 558 said:

> "The words 'certain railroad freight car' might apply to any one of the vast number of freight cars in

existence in the United States, or in the world, for that matter; and for the same reason the words 'certain goods' might apply to any kind of the thousand varieties of property. The car of goods might be moving in interstate commerce on any railroad in the United States and between any two of the great number of towns existing in different states. The kind and character of the goods are not stated. The word 'steal' as used in the statute, is used as equivalent to the word 'larceny.' In order to constitute the crime of stealing, several elements must be established."

See also: *Pettibone* v. *United States*, 148 U. S. 197; *United States* v. *Hess*, 124 U. S. 483; *United States* v. *Britton*, 108 U. S. 205.

It is respectfully submitted that it is plain that the indictment in this case is fatally defective as being indefinite and uncertain and failing to inform the petitioner of the nature and cause of the accusation, and that the demurrer on this ground should have been sustained.

(b) The indictment charges a conspiracy to commit a substantive offense involving a concert of action and therefore the charge of conspiracy will not lie.

A most casual examination of paragraph 14 will show that it charges a violation of the substantive offense of bribery of a United States officer almost word for word, in the language of Title 18 U. S. C. Sec. 91 an offense necessarily involving concerted action. It is clear that the phrase "that is to say," is not a videlicet marking the termination of the preceding language and all the subsequent matter in this paragraph being part of the same

sentence is correctly to be regarded as an essential part of the charge. *Browne* v. *United States*, 145 Fed. 1, 5 (C. C. A. 2).

It is plain that the prosecuting attorney in seeking to obtain the liberal rules of evidence incident to a conspiracy charge, was confronted with the difficulty that bribery was in truth the substantive offense asserted to be the object of the conspiracy. Hence, under the authority of *Gibardi* v. *United States*, 287 U. S. 112; *United States* v. *Sager*, 49 F. 2d 725 (C. C. A. 2); *United States* v. *Hagan*, 27 Fed. Supp. 214 (D. C. Ky.); *United States* v. *N. Y. C. & H. R. R. Co.*, 146 Fed. 298 (C.C. N.Y.); *United States* v. *Dietrich*, 126 Fed. 664 (C.C. Neb.) the conspiracy count would not lie. In an obvious effort to avoid the difficulty the prosecutor merely inserted a general characterization of the objective as being the defrauding of the United States. That is a resort to the most flimsy subterfuge.

It is respectfully submitted that the indictment in this case is fatally defective in charging a conspiracy to commit an offense involving a concert of action and that the demurrer on this ground should have been sustained.

VII.

The appointment by the trial court of counsel for one defendant to also represent a co-defendant having adverse interests was a denial of the constitutional right of effective assistance of counsel.

Some time before trial Glasser had retained as his attorney William Scott Stewart. On the day set for trial, counsel for Kretske filed a motion for continuance (R. 173). This motion was denied and another attorney was appointed for Kretske. The following day this was vacated. Thereafter the court appointed Glasser's attorney to represent Kretske over Glasser's objection in person,

stating that he would like to have the exclusive representation of his lawyer (R. 181). Previously Glasser filed an affidavit stating that there was inconsistency in the defense of Glasser and Kretske (R. 171).

Petitioner in the interest of brevity respectfully requests permission to adopt the argument of petitioner Glasser on this point in *Glasser* v. *United States*, No. 30, and in addition thereto contends that the dual representation so affected the effective representation of Glasser as well as Kretske as to result in prejudice to the petitioner. Since this is a conspiracy case, error committed as to any of the defendants is error as to all. *Logan* v. *United States*, 144 U. S. 263.

VIII.

The grand jury was illegally constituted because of the deliberate exclusion of women from the jury box from which the grand jurors were selected.

The indictment was filed September 29, 1939 (R. 38). On October 12, 1939, when called for pleas, defendants were granted leave to file motions within twenty days and the cause was continued for pleas to November 30, 1939 (R. 40). A motion to quash (R. 141-149) was filed October 31, 1939 (R. 40). The government made a motion to strike (R. 150). The motion to quash was denied (R. 42).

One of the grounds of the motion to quash was that the federal officials appointed to select grand jurors deliberately excluded all persons of the female sex, on account of their sex, from the jury box from which the grand jurors were drawn, notwithstanding the state law then in effect making it mandatory to include females on jury lists. The affidavit (R. 148) charges that the clerk of the court and the federal jury commissioner refused to follow the state law on the ground that it was not mandatory. It further

charged discrimination and the sufferance of substantial injustice by failure of the officials to follow the state law.

On May 12, 1939, the Illinois legislature amended Section 1 of the so-called "Jury Act" by making it mandatory that women be placed upon the jury list throughout the state (Illinois Rev. Stats. 1939, c. 78, sec. 1, Appendix p. 75), and to the same effect amended Section 2 of the "Jury Commissioners' Act" (Illinois Rev. Stats. 1939, c. 78, sec. 25, particularly applying to counties having a population of 140,000 or more, Appendix p. 76).

This amendatory act, it must be conceded, became the law of the state on the date of its approval by the Governor, namely May 12, 1939, although by virtue of the provisions the of State Constitution, to-wit: Article 4 of Section 13, the act did not become effective until July 1, 1939.

The constitutionality of the amended act was sustained on August 8, 1939 in *People* v. *Traeger*, 372 Ill. 11.

By virtue of Sec. 412, Title 28 U. S. C., (Appendix p. 75), the clerk of the District Court for the Northern District of Illinois and the appointed jury commissioner are the persons who place in the box the names of the persons from which the grand jurors were selected.

The Circuit Court of Appeals held that the county boards were privileged to wait until September 1, 1939, by virtue of Sec. 1, C. 78, Illinois Rev. Stats. 1939 before including women on the jury lists and since the members of the September, 1939 grand jury were summoned August 25, 1939, there was no irregularity (R. 1118). But a reading of Sec. 1, C. 78 is impelling to the conclusion that county boards were required to act before September 1 to make effective the then existing law. "The county board of each county shall at or *before* the time of its meeting in September, in each year, or at any time thereafter, *when necessary for the purpose of this Act* make a list of a suf-

ficient number * * * of each sex * * * to be known as a jury list." (Italics supplied.)

Moreover, the clerk of the court and the federal jury commissioner are not controlled by any state law fixing their meeting time as annually in September. Their position, as charged in the affidavit (R. 148) and admitted by the government's motion to strike (R. 150), was that the law was not mandatory and that they were not required to follow it.

Sec. 411, Title 28, U. S. C. (Appendix p. 74) provides that jurors in the courts of the United States shall have the same qualifications as in the highest court of law in the respective states *when summoned for service* in the courts of the United States. (Italics supplied.)

The Circuit Court of Appeals held that there was no prejudice alleged in any way and that the objection was technical, the reason being that grand jurors do not try the case but merely charge the accused (R. 1118).

The crushing effect of an indictment is no light matter and an accused is entitled to the protection of the Constitution and every law and safeguard to prevent him from being put to trial on an indictment unless it is properly found and returned by a properly constituted grand jury.

> The selection of a grand jury by the officers, who by law are the only ones vested with that power, is not a mere defect or imperfection in form. It is a matter of substance which can not be disregarded without prejudice to the accused.
>
> *Crowley* v. *United States*, 194 U. S. 461.
> *Hoypt* v. *Utah*, 110 U. S. 574.
> *United States* v. *Gale*, 109 U. S. 65.
> *Renigar* v. *United States*, 172 Fed. 646 (C.C.A. 4).
> *United States* v. *Lewis*, 192 Fed. 633 (D.C. Mo.).
> *State* v. *Cantrell*, 21 Ark. 127.

Qualifications of Jurrors and mode of their selection are matters for the legislature.

Tynan v. *United States*, 297 Fed. 117 (C.C.A. 9).

Where no attempt is made to comply with the legal method provided for the drawing, summoning, or impanelling jurors, a challenge to the array (or motion to quash) must be sustained even though no prejudice is shown.

People v. *Mack*, 367 Ill. 481, 487, 488.
People v. *Clempitt*, 362 Ill. 534.
People v. *Schraeberg*, 347 Ill. 392.
People v. *Fudge*, 342 Ill. 574.
People v. *Mankus*, 292 Ill. 435.
People v. *Linquist*, 289 Ill. App. 250.

The Illinois State Legislature, having legislated on the qualifications of jurors, and the statute having been construed by the highest court of the state, the statute and the construction are controlling in the United States court.

Pointer v. *United States*, 151 U. S. 396.

The Clerk of the District Court and the jury commissioner should have followed the Illinois statute when organizing the grand jury and should not have deliberately excluded female jurors. It was then the law of the state that women were qualified jurors.

Crowley v. *United States*, 194 U. S. 460.

It is respectfully submitted that the motion to quash the indictment on the ground assigned under this point should have been sustained.

CONCLUSION.

The road for an attorney is increasingly a difficult one and there are some who view his every action with suspicion. When one has been in the profession for years and has gained a reputation for integrity by many lawyers engaging him in his field, it is such unfortunate occurrences as the present one that emphasizes the fact that one may lose the fruits of those years of honest labor by being placed in a hostile and prejudicial atmosphere by the evidence permissible under a dragnet type of indictment and subjected to vicious inferences.

There was no evidence that this petitioner conspired with anyone to defraud the United States of the conscientious services of Glasser or anyone else, on the contrary the evidence vindicates him.

The petitioner, a member of the bar of this Court, was tried by a packed jury on a fatally defective indictment in an atmosphere fatal to the proper administration of justice because of the improper and prejudicial conduct of both the judge and prosecutors. He was denied that fair and impartial trial that is the boast of the American system of criminal justice.

Wherefore, it is respectfully submitted that the judgment of the lower court be reversed.

Respectfully submitted,

ALFRED E. ROTH,

September, 1941. *Pro se.*

APPENDIX

APPENDIX.

Constitutional Provisions Involved.

Amendment V. to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI. to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U. S. C., Title 18, sec. 88 (Criminal Code, sec. 37):

Conspiring to commit offense against United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United

States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

U. S. C., Title 18, sec. 91 (Criminal Code, sec. 39):

Bribery of United States Officer. Whoever shall promise, offer, or give, or cause or procure to be promised, offered, or given, any money or other thing of value, or shall make or tender any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to any officer of the United States, or to an person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the Government thereof, or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made, or tendered, and imprisoned not more than three years.

U. S. C., Title 28, Sec. 411 (Judicial Code, sec. 275):

Jurors; qualifications and exemptions. Jurors to serve in the courts of the United States, in each State respective-

ly, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned.

U. S. C., Title 28, sec. 412 (Judicial Code, sec. 276):

Same; manner of drawing. All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court, or a duly qualified deputy clerk, and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk, or a duly qualified deputy clerk then acting, may belong, the clerk, or a duly qualified deputy clerk, and said commissioner each to place one name in said box alternately, without reference to party affiliations until the whole number required shall be placed therein.

Illinois Rev. Stats. (1939) c. 78, sec. 1:

The county board of each county shall at or before the time of its meeting, in September, in each year, or at any time thereafter, when necessary for the purpose of this Act, make a list of sufficient number, not less than one-tenth of the legal voters of each sex of each town or precinct in the county, giving the place of residence of each name on the list, to be known as a jury list.

Illinois Rev. Stats. (1939), c. 78, sec. 25:

The said commissioners upon entering upon the duties of their office, and every four years thereafter, shall prepare a list of all electors of each sex between the ages of 21 and 65 years, possessing the necessary legal qualifications for jury duty, to be known as the jury list. The list may be revised and amended annually in the discretion of the commissioners. The name of each person on said list shall be entered in a book or books to be kept for that purpose, and opposite said name shall be entered the age of said person, his occupation, if any, his place of residence, giving street and number, if any, whether or not he is a householder, residing with his family, and whether or not he is a freeholder."